ADDRESS

OF

AMOS KENDALL,

TO THE

COMMITTEE ON INDIAN AFFAIRS

OF THE

HOUSE OF REPRESENTATIVES,

IN RELATION TO THE CLAIM OF

AMOS AND JOHN E. KENDALL.

WASHINGTON:
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TO EACH MEMBER

OF THE

SENATE AND HOUSE OF REPRESENTATIVES.

Having a just claim of great importance pending before the two Houses of Congress and finding it impossible to explain it to every member in person, yet desirous that every member shall understand it, I take the liberty earnestly to solicit a careful perusal of the following Address. If, as I am persuaded, you shall find our claim stronger than any claim for French or Mexican spoliations which exists now or ever has existed—a claim originating in a wrong without precedent or parallel committed by the government itself on its own citizens, I do not doubt your readiness to grant prompt and ample redress. The government is always the same through all changes of men who administer it; and the obligation of those who now hold the legislative and executive powers to redress injuries done by their predecessors in their official character, is as strong as if they had done those injuries themselves.

Hence it is that I address you.

AMOS KENDALL.

ADDRESS.

By the courtesy of the Committee on Indian Affairs of the House of Representatives, Mr. Kendall was allowed to attend their meeting for the purpose of explaining his views of the claim. Before he commenced, Col. Orr, the Chairman, stated to him, that it was unnecessary for him to go into an exposition of the facts, the Committee being satisfied on that head; but what they wanted to understand was, the grounds upon which it is supposed the United States are bound to pay the claim.

Mr. Kendall said, he had been impressed with the belief that no doubts existed in the minds of the Committee as to the undertaking of the claimants and the rendition of the service, and that he had prepared himself to discuss only the obligation of the United States to grant the indemnity prayed for. There were arguments bearing on that subject not embraced in the Memorial, under the impression that the views therein presented were conclusive as to the obligation of the United States to allow this claim.

We base our claim upon the United States, said Mr. Kendall, on the following grounds, viz:

1. The duty of the Government to protect the citizen in his lawful transactions, against wrong by foreign powers, and seek redress and indemnity when wrongs are committed by such powers.

2. The obligation of the Government, when in furtherance of its policy, it destroys or impairs the creditor's security, to pay the debt out of its own Treasury.

3. The obligation of the Government to respect its own laws in its dealings with the citizen.

1. The first ground divides itself into two branches: *First*, where the power is entirely foreign and independent, as Great Britain, France and Mexico; and *secondly*, where the power is foreign to some extent but not independent, such as the Indian Tribes within the limits of the United States.

The protection of the citizen against wrongs and outrages from foreign nations, is perhaps the highest duty of our general government. To this end is its entire diplomatic system and its entire naval establishment maintained at an annual expense of many millions of dollars. When a civilized nation seizes unlawfully the property of an American citizen, redress is demanded through our diplomatic agents; when by a savage or barbarian power, it is demanded at the cannon's mouth.

We do not mean to say, nor is it necessary to our argument, that government is bound in all cases to *obtain* indemnity for wrongs done its citizens by foreign powers or pay the money out of its own Treasury; but we do say, it is bound to use all reasonable exertions for that purpose. We do say, that *if the indemnity be within its own power*, or the securing of it *dependent on its own will*, it will be faithless to its trust if it do not secure it, and will become justly liable to indemnify the citizen out of its own Treasury.

During the wars which grew out of the French revolution, an immense amount of American property afloat on the ocean, was unlawfully seized by British cruisers. Our government negotiated, remonstrated and finally went to war; but failed in obtaining redress. It had discharged its duty to the utmost of its power and was not bound to indemnify the citizen for his losses by British depredations.

Similar depredations were committed by French cruisers which became the subject of negotiation. A portion of the claims of American citizens thence arising, were given up by Treaty as a con-

sideration for the relinquishment by France of certain claims against the United States growing out of previous Treaties. For these claims, being for French Spoliations prior to 1800, the holders insist that the United States are responsible, and for about fifty years they have been petitioning Congress for redress.

French spoliations subsequent to 1800 continued to be a subject of negotiation until after General Jackson's accession to the Presidency, when by Treaty the French government agreed to make restitution. But the French Legislative Chambers refused to make the necessary appropriation until President Jackson recommended reprisals upon French commerce in case of further delay. The money was then forthcoming.

Claims of our citizens on Mexico were one of the causes of the Mexican war; and in the Treaty of peace three and a quarter millions were set apart out of the indemnity to be paid to Mexico for Territory ceded, to satisfy those claims.

Now, in relation to French spoliations prior to 1800, if the United States had had money belonging to the French government in their own hands sufficient to satisfy them, and instead of so applying it had paid it over to the French nation, would not the case of the claimants have been stronger than it is now? And if they had not only had the money in their Treasury, but if the French Government, admitting the justice of the claimants' demands, had requested the United States to pay them out of that fund, and yet the United States had paid it over to the French, notwithstanding that request, would not their claim on our own Government have been irresistible?

So when our Government had received the indemnity for French spoliations subsequent to 1800, if it had refused to distribute it among our own suffering citizens, but had paid it back to France, would not the act have been denounced as a faithless dereliction of duty, and would not the claimants have had a just claim to be paid out of the Treasury of the United States?

In relation to Mexican claims, the indemnity was already in the hands of the United States: Could they, without responsibility to the claimants, have paid it all over to Mexico and told their own citizens to get paid as they could? There is not an intelligent and just man in the world, who would not have said the government in such case was false to its trust and was bound to indemnify its citizens out of its own Treasury.

These hypothetical cases are based on general principles, which ought to guide the government in discharging its duty to the citizen. We shall show that there are special circumstances in our case, which make it much stronger than any we have supposed.

II. The proposition that when, in furtherance of public policy, the government destroys or seriously impairs a creditor's security, it is bound to pay the debt out of its Treasury, is so obviously just as scarcely to admit of argument. It is substantially taking private property for public use.

The Republic of Texas while entirely independent, contracted debts and pledged as security her Custom House revenues. By annexation to the United States, these revenues were diverted from that object and brought into the Treasury of the Union. This portion of the creditors of Texas maintained, that inasmuch as the United States had deprived them of their security, they were bound to provide for the payment of their demands. Congress yielded to the force of the argument and gave Texas for various considerations ten millions of dollars, five millions of which were set apart for the payment of the debt in question.

Now, suppose the government of Texas had been annihilated by the Treaty of annexation, and that not only her customs but her public lands and her entire power of taxation had passed into the hands of the United States, would not the claims of her creditors on our government have been incomparably stronger? Surely no just man will say, that the United States, after not only taking away the creditor's security but annihilating the debtor, would not have been bound to pay every debt of Texas of whatever description.

Now let us apply these principles to the case in hand.

Every principle defining the duties of our government in relation to the protection of our citizens in their lawful transactions with governments entirely foreign, applies with greater force to their transactions with the Indian Tribes within the limits of the United States. The obligation of the government to protect, is commensurate with its power to protect, and where the power is absolute, the obligation is perfect.

The relation in which the Indian Tribes stand to the United States is clearly defined in the opinions given by Justices of the Supreme Court in the celebrated case of the Cherokee Nation vs. the State of Georgia, in which the Cherokees claimed to be entirely independent.

In Peter's Reports, Vol. V, page 16, *Chief Justice Marshall* speaks of this subject as follows, viz:

"The Indian Territory is admitted to compose a part of the United States. In all our maps, geographical treaties, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the Treaty of Hopewell, which preceded the constitution 'to send a deputy of their choice, whenever they think fit, to Congress.' Treaties were made with some tribes by the State of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that State, taking back a limited grant to themselves, in which they admit their dependence.

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes who reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

"They look to our government for protection, rely upon its kindness and its power; and appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."

The Cherokees in particular had virtually acknowledged themselves not only dependent but *subjects* of the United States, as shown in the opinion of *Justice Baldwin* in the same case. Pages 36-7, he says:

"I now proceed to the instructions which precede the Treaty of 'Hopewell with the complainants, the treaty, and the consequent pro-'ceedings of Congress. On the 15th of March, 1785, Commission-'ers were appointed to treat with the Cherokees and other Indians 'southward of them, within the limits of the United States, or who 'had been at war with them, for the purpose of making peace with 'them, and of receiving them into the favor and protection of the 'United States, &c. They were instructed to demand that all pri-'soners, negroes and other property taken during the war, be given 'up; to inform the Indians of the great occurrences of the last 'war; of the extent of country relinquished by the late treaty of 'peace with Great Britain; to give notice to the Governors of Vir-'ginia, North and South Carolina and Georgia, that they may attend 'if they think proper; and were authorized to expend four thou-'sand dollars in making presents to the Indians; a matter well 'understood in making Indian treaties, but unknown at least in our 'treaties with foreign nations, Princes or States, unless on the Bar-'bary coast. A treaty was accordingly made in November following, 'between the Commissioners Plenipotentiaries of the United States 'of the one part, and the head men and warriors of all the Chero-'kees of the other.

"The word nation is not used in the preamble or any part of the 'treaty, so that we are left to infer the capacity in which the Chero-'kees contracted, whether as an independent nation or foreign 'State, or a tribe of Indians, from the terms of the treaty, its stipu-'lations and conditions. 'The Indians for themselves and their 'respective tribes and towns, do acknowledge all the Cherokees to 'be under the protection of the United States.' Article 3, 1 Laws 'U. S., 322. The boundary allotted to the Cherokees for their 'hunting grounds between the said Indians and the citizens of the 'United States, within the limits of the United States, is and shall 'be the following: viz: (as defined in Article 4.) For the benefit 'and comfort of the Indians, and for the prevention of injuries and 'aggressions on the part of the citizens or Indians, the United States 'in Congress Assembled, shall have the sole and exclusive right of

'regulating the trade with the Indians, and managing all their af-
'fairs in such manner as they shall think proper. Article 9."

An opinion of the Attorney General, dated December 21, 1830, in which is discussed the political condition of the Western Cherokees, occupies the same ground in relation to the Indian Tribes within the United States and speaks of that particular Tribe as follows, viz:

"In the Treaty made with the Cherokees at Hopewell in 1785,
'it is provided, that the United States "shall have the sole and ex-
'clusive right of regulating the trade with the Indians and manag-
'ing all their affairs in such manner as they think proper.', In the
'Treaty of Telleco in 1798, the pre-existing treaties between the
'same parties are acknowledged to be in force. The same recog-
'nition is found in the Treaty at the same place in 1805. And in
'the Treaty with both parts of the Tribe entered into at the Cher-
'okee Agency in 1817, and with a view to the removal of a portion
'of the Tribe west of the Mississippi, it is provided "that the
'Treaties heretofore made between the Cherokee Nation and the
'United States are to continue in full force *with both parts of the*
'*nation*," while the Treaty of 1828, which improves the condition
'of the Cherokees west of the Mississippi by their location beyond
'the limits of *State* and *Territorial dominion*, and in the perma-
'nent guaranty of their lands, is so far from recognizing them as a
'distinct and independent people, withdrawn from the limits and
'beyond the jurisdiction of the United States, that this Treaty itself
'contains a provision that the United States shall, when they desire
'it, enact for them a set of plain laws, suited to their condition."—
Opinions of Attorney General, page 801.

This is the very Tribe of Indians with whose Delegation we contracted.

Now, can it be imagined, that the obligation of the government is less to protect the citizen against wrong from this dependent savage tribe, than from Great Britain, France or Mexico? If these Indians seize the property of an American citizen, is its duty less to seek and enforce retribution? And if it holds in its own hands the money of the tribe, and the citizen shows he has a just claim upon them, lawfully contracted, is it not on general principles, as much its duty to pay it out of that fund as it was to distribute among its own citizens, creditors of Mexico, the indemnity money

reserved in the Treaty of Guadalupe Hidalgo? If in that case, the United States had the consent of the government of Mexico to the distribution, so in this they had the consent of the Western Cherokees through their only existing authorities, their recognized Delegation.

If our claim had been against France, which government had not only recognized it, but had requested the United States to pay it out of French money in their Treasury, and they had not only refused to do so, but had distributed the money among the French people, would they not have been bound to pay it out of their own Treasury?

If our claim had been against Mexico instead of the Western Cherokees, and if, instead of paying us out of the Treaty Fund, the United States had distributed that fund among the people of Mexico, would they not have been bound to pay it out of their own Treasury?

In our case, the United States not only scattered our money among the Indians, but utterly destroyed our security by taking from the Western Cherokees, all their property and claims and even their separate existence as a party, merging them into one corporate body with the other Cherokee parties. Their annuities had already been taken from them without their consent, and in the 4th Article of the Treaty of 1846, they surrendered every thing else.

The last clause of that Article, reads as follows, viz:

"In consideration of the foregoing stipulation on the part of the 'United States, the 'Western Cherokees' or 'Old Settlers," here-'by release and quit-claim to the United States all right, title, inter-'est, or claim, they may have to a common property in the Cherokee 'lands east of the Mississippi river, and to exclusive ownership to 'the lands ceded to them by the treaty of 1833 west of the Missis-'sippi, including the outlet west, consenting and agreeing that the 'said lands, together with the eight hundred thousand acres ceded 'to the Cherokees by the Treaty of 1835, shall be and remain the 'common property of the whole Cherokee people, themselves in-'cluded."

The 2d Article of the Treaty provides as follows, viz:

"All difficulties and differences heretofore existing between the 'several parties of the Cherokee Nation, are hereby settled and 'adjusted, and shall as far as possible, be forgotten and forever 'buried in oblivion.

"*All party distinctions shall cease, except so far as they may be* 'necessary to carry out this convention or treaty. A general amnes-
'ty is hereby declared. All offences and crimes committed by a
'citizen or citizens of the Cherokee Nation, against the nation, or
'against an individual or individuals, are hereby pardoned. All
'Cherokees who are now out of the nation, are invited and earn-
'estly requested to return to their homes, where they may live in
'peace, assured that they shall not be prosecuted for any offence
'heretofore committed against the Cherokee Nation, or any individ-
'ual thereof.,' * * * *

Article 5th of the Treaty is as follows, viz:

"It is mutually agreed that the *per capita* allowance to be given to
'the Western Cherokees or Old Settlers upon the principle above
'stated, shall be held in trust by the Government of the United
'States and paid out to each individual belonging to that party or
'head of family or his legal representatives."

These extracts from the Treaty clearly exhibit the position of the United States in relation to the Western Cherokees and their creditors.

The first shows that the United States, in arranging the affairs of this dependent Tribe of Indians to suit their own policy, exacted from them a surrender of all their separate property and claims.

The second extract shows, that thenceforward they were to be considered *extinct as a separate party, band or tribe*, and merged with the other Cherokee parties into one community.

The third extract shows, that the moneys to be allowed the Western Cherokees in consideration of the surrender of all their lands, claims and existence as a separate community, were to be held by the United States *in trust for the individuals who had constituted the party thus annihilated.*

Now, we had a just and lawful claim against the Western Cherokees *as a party*, of which the United States were fully apprised. With this knowledge, they proceed to dissolve that party and take all its effects into their own hands to be distributed among the individuals who composed it. Could they justly, or honestly, or lawfully, make such distribution regardless of the just, lawful and acknowledged claims of the creditors of that party?

Had Texas in the Treaty of annexation surrendered not only all her property, but her power of taxation and her separate existence in consideration of a sum of money to be paid to her citizens *per*

capita, could the United States have accepted the surrender without becoming reponsible for all her just debts? And if by the Treaty of Guadalupe Hidalgo, the Mexican Republic had been dissolved and the whole indemnity money had been paid out to individual Mexicans, regardless of the just claims of American citizens on Mexico, would not the government have been bound to pay those claims? But those communities were not annihilated; and had the United States failed to do their duty by securing indemnity to their injured citizens, they might have still have appealed to their debtors for redress. But in our case it is not so. The United States destroy our debtor and convert his effects into money in their own Treasury. And when a creditor, with a claim acknowledged to be as just as ever existed, comes and asks payment out of these effects, he is told that they are held in trust for the bankrupt heirs of the debtor! And, *though a citizen* specially entitled to the protection of his government, he finds that government, not indeed conspiring to defraud him, but of its own will pursuing a course to deprive him of his just dues as effectually as if it were a party to a wilful and stupendous fraud. *It destroys the security, kills the debtor and administers upon his effects, but refuses to pay his debts out of his own assets!*

Can our government do all this without incurring any responsibility to its own citizens whose interests it is solemnly bound to protect?

III. All-sufficient as general principles are to sustain our claim against the governments; it rests also on a still stronger ground: *To wit:—The utter disregard by the government of its own laws in our case.*

Our contract was dated the 12th day of July, 1843.

It had from time immemorial been the established law in England and the United States, that a Power of Attorney coupled with a contract as security for money lent or compensation for services rendered, is irrevocable. Our own Supreme Court in the case of Hunt vs. Rousmanier, found in 8th Wheaton's Reports, pages 201-2, held the following language, viz:

"The general rule is, that a letter of attorney may at any time be 'revoked by the party who makes it, and is revoked by his death. 'But this rule, which results from the nature of the act, has sus-'tained some modification. Where a letter of attorney forms a part 'of a contract, and is security for money, or for the performace of

'any act which is deemed valuable, it is generally made irrevoca-
'ble in terms, or, if not so, is deemed irrevocable in law. Although
'a letter of attorney depends from its nature on the will of the per-
'son making it, and may in general be revoked at his will; yet, if
'he binds himself for a consideration in terms, or by the nature of
'his contract, the law will not permit him to change it."

The law, as thus laid down, had, prior to our contract with the Western Cherokees, been recognised and acted upon by the Government of the United States.

At page 1,066 of "Attorney Generals' Opinions," there is an opinion of Attorney General B. F. Butler, to the effect that a power of attorney to secure an agent's commission cannot be revoked. His language is as follows, viz:

"In my opinion, the letter of attorney to Mr. Lawrence, executed
'by N. Rogers, surviving executor of the estate, may at any time be
'revoked by him, *except as to the admitted amount of Mr. Lawrence's*
'*commission—five per cent.* Your Department, in my opinion, will
'therefore be justified in issuing the certificates on the award to Mr.
'Rogers himself, or to any attorney he may appoint, for 95 per
'cent. thereof, on his due revocation of the former power."

But the principle is much more explicitly laid down by Attorney General Gilpin, in March, 1840, (Churchill's case, pages 1,303—4:)

"Your first inquiry is, whether the provisions of the 9th and 17th
'articles, (which direct that the just debts of the Indians shall be
'paid out of any moneys due them for their improvements and
'claims arising under or provided for by the treaty shall be examined
'and adjudicated by certain commissioners, whose decision shall
'be final,) apply to the case of a person to whom a debt was owing
'at the date of the treaty, but who has acted as an attorney for the
'Indian, for the recovery of his claim, and has had the sum in
'question adjudicated to him as a proper compensation for so acting.
'In reply to this inquiry, I have the honor to say, that I do not con-
'sider this to be one of the debts intended to be provided for by the
'9th article of the treaty. I am of opinion, however, that if the
'person presenting the claim was a duly constituted attorney of the
'Indian, with authority to prosecute and recover the claim, and the
'Department is satisfied that the contract between him and his
'principal is free from fraud, and is a just compensation for services
'rendered—in such case he has an interest in the fund, which the
'Department ought to recogize; and it should not, by paying over

'the whole amount to the Indian, subject him to the probable dan-
'ger of loss, and the certainty of much expense and delay.

"Your second inquiry is, whether the whole scope of the treaty
'does not warrant a payment to the Indians, in person, of such sums
'as may be due to them under it; or whether they must be paid to
'persons who present powers of attorney from them?

"In reply to this inquiry, I have the honor to state, that the treaty
'clearly recognises payments directly to the Indians, and the De-
'partment will be fully warranted in so making them. I beg, how-
'ever, to observe, that I consider the remarks I have made in reply
'to your first inquiry as equally applicable to these cases; for cer-
'tainly, where an attorney has performed an important service,
'collected the evidence, and been instrumental in securing a claim
'which might otheawise have been lost, and where this has been
'done under the stipulation, or with a *bona fide* underst anding,
'that he was to receive the amount to which he was entitled direct-
'ly from the United States, he has an interest in the fund, which
'the principal himself could not revoke, and which the Department
'is bound to recognise."

This was the law as announced by both the Judicial and Execu-
tive Branches of our Government when our contract was made.

The case before the Attorney General was perfectly parallel to
onrs, involving the rights of Indians and their Agents and *the duties of the Government.* The Law Officer of the government told the War Department that is was "*bound to recognise*" an Agent's in-
terest in Indian funds, created by "*a stipulation or a bona fide un-
derstanding*" that he was to receive his compensation for services rendered "*directly from the United States.*"

How "*bound to recognise*"? By the Law of the Land establish-
ed by its Courts, making such Powers of Attorny irrevokable and requiring the holder of the fund to pay over to the Agent his por-
tion of it so secured.

We availed ourselves of the unquestioned and uuquestionable Law of the Land as announced by the government itself, in making our contract with the Western Cherokees. The service undertaken by us was arduous. They had no means of compensating us but by giving us "an interest in the fund" which they might obtain as indemnity. We consented to accept that interest and proceeded to secure it, not by "a *bona fide* understanding," but by "*an express stipulation,*" or irrevocable power of attorney, just such a title as

the government stself told us it was "*bound to recognize.*" to show this beyond all cavil, I beg leave to read an extract from our contract, viz:

"In consideration whereof, the undersigned, John Rogers, John 'L. McCoy, and Ellis F. Phillips, Delegates duly authorized as 'aforesaid, do hereby, on behalf of said Cherokees West, covenant 'and agree to pay, or cause to be paid, the full commission of five 'per cent. to the said A. & J. E. Kendall, upon any sum or sums 'of money or whatever else of value may be allowed and appropri-'ated in full or part satisfaction of said claims, to be paid from time 'to time, as appropriated or allowed; and the said Delegates do 'hereby authorize and empower the said A. & J. E. Kendall, as 'agents and atttorneys in fact for the said Cherokees West, to de-'mand and receive from the Treasury of the United States, or from 'the proper office or officer thereof, one-twentieth part of all sums 'of money which may be allowed and appropriated, or one-twen-'tieth part of any stock, scrip, or any other species of funds, secu-'rities, or annuities, which may be allowed, to be made out and 'issued in their own names; and if lands or other property, or any 'interest theretn, shall he granted in discharge of said claims, or 'any part thereof, to demand and receive from the proper office or 'officer a full title to one-twentieth part thereof, it being the true 'intent and meaning of said Delegates that the said A. & J. E. 'Kendall shall receive five per cent,, or one-twentieth part, of any 'and every thing of value which may be granted or appropri ated 'on account of said claims, to be received directly from the United 'States without any further act or authority by or from the said 'Cherokees West.

"And the said Delegates do further authorize and empower the 'said A. & J. E. Kendall, as agents and attorneys in fact of the 'said Cherokees West, to sign the names of the said Delegates to 'any letters and memorials to the President, Secretary of War, 'Senate, House of Representatives, or other officer or individual 'necessary to the prosecution and allowance of said claims; and 'to execute any receipts, acquittances, or other instruments of writ-'ing which may be necessary to procure the payment or delivery 'to them, according to the true intent and meaning of this instru-'ment, of one-twentieth part of the money, property, or evidence 'of right, title, or claim to any money or property which may be

appropriated or allowed in satisfaction of said claims in full or in part."

For the whole contract, see Senate Ex. Doc. No. 32, 1 Sess. 32 Congress, page 27 to 30.

Now, I beg the Committee to consider, whether it was possible for us by any frame of words more effectually to bring our case within the principle laid down by Chief Justice Marshall, and Attorneys General Butler and Gilpin.

Here, in the language of Chief Justice Marshall, "*a letter of attorney forms part of a contract,*" *and is the only security for the performance of valuable services*—such as he says "*is deemed irrevocable in law.*"

Here, there is not a "*bona fide* understanding" merely, but a wrriten "stipulation" that we were to receive the amount to which we might be "entitled *directly from the United States,*" which the Attorney General says, gave us "*an interest in the fund*"—an interest which the Cherokees themselves "*could not revoke*"—an interest which the Governments *is bound to recognise.*"

Now, was the law as laid down by Chief Justice Marshall unsound? Was the law and its consequences as laid down by the Attorney General false and defective? Was the usage of the government (which is a law to the citizen) from time immemorial and for years after the formation of our contract, unjust and illegal? No man pretends to question the law or the usage under it. The Chief Justice was right, the Attorney General was right, the usage of the government was in conformity with law and right.

What is the legal consequence? Our contract and power of attorney gave us an *actual vested interest* in the claim of the Western Cherokees, beyond their own reach, beyond the lawful reach of the United States, secure by all the forms and sanctions which the laws could cast around it. It was *ours, our property* in the hands of the government, as effectually and entirely as the balance of the claim was the property of the Western Cherokees. The United States had no more lawful right to pay over our interest to the Western Cherokees than they had to pay over to us the portion belonging to the Western Cherokees. Such is the unquestionable result of the application of the law as laid down by the government itself for the guide of the citizen.

Yet, the United States, in disregard of our rights and its own laws, unrepealed and unaltered, after full notice of the facts in the

case, refused to pay over to us that portion of the Western Cherokee Fund which of right and by law belonged to us, and distributed it among the Western Cherokees. They treated as revoked a power of attorney which by law was irrevocable; they disregarded an interest they were bound by law to recognize; and having with their eyes open given away our money in their hands, to those to whom it did not belong, they are as much bound to indemnify us as they would be any other citizen whose property they might seize and give it to the Indians.

What had we done to forfeit our right to the protection of our country's laws and justify this act of confiscation? Nothing whatsoever. We were recognised by the Government through a series of years as agents of the Western Cherokees; as such we received official notice of the appointment of the commissioners who negotiated the treaty of 1846; we appeared before them and addressed them in our official character; and to our labors, in a great measure, have the officers of our own Government attributed the success of the Western Cherokees. Not a shadow of imputation has been cast upon our fidelity to our principals or to our own Government; on the contrary, we are told here and elsewhere that no doubt exists about the facts, and that the only question is whether the United States are by law bound to pay our claim? In other words, *are they bound to refund to us our money, which, knowing it to be ours, they have given to the Western Cherokees?* It would seem scarcely necessary to do more than state the proposition to elicit an affirmative response; but let us consider for a moment the pleas upon which it is supposed the Government is justified in withholding relief.

The main plea is, that the treaty of 1846 provides on its face that all the moneys found due to the Western Cherokees should be paid to them individually, *per capita*, and that this provision was binding on the United States, being a part of their bargain with the Western Cherokees.

Now, our contract with the Western Cherokees preceded the treaty more than three years. By that contract and power of attorney we acquired "*an interest in this fund*," which the Western Cherokees could not revoke. How then could they make any subsequent arrangement by treaty or otherwise, *binding on themselves or anybody else*, which should give a different direction to

that interest? It was no longer theirs to dispose of, and if they attempted to dispose of it in any other way, their act was void. And is it possible that an act illegal and void on their part, can be considered binding on the United States? If they attempted by treaty to secure to themselves or to any one else property which they had previously irrevocably alienated, were the United States bound to consider such a fraudulent act binding on them? Suppose the entire claim of the Western Cherokees had been assigned away by an instrument admitted to be legal and irrevocable by the laws of the United States; suppose that concealing this fact they had made a treaty with the United States providing for the distribution of the same property among themselves; and suppose before the execution of the treaty, the fraud had been discovered—is there an honest man in the world who would say the United States were bound to consummate the fraud by executing that portion of the treaty? We think not; we think every member of this committee and every honest man would say it was their duty not to deliver the property as provided in the treaty, but to turn it over to its true and lawful owners.

This principle applies directly to our case. Five per cent, or one-twentieth part of the Western Cherokee claim, became ours by an instrument irrevocable in law before the treaty was formed. Practically, the Western Cherokees attempted to defraud us by agreeing to a provision in the treaty for dividing our compensation among themselves and turning us adrift without a dollar. Now, was it the duty of our own Government to aid in and insist upon the consummation of the fraud? If the Western Cherokees imposed on the United States a treaty provision robbing citizens of the United States of their vested, legal rights and property, is it their duty by executing the fraudulent provision to aid the Indians in consummating the robbery? To say that it is, is to say that it is the duty of Government in such cases to promote fraud instead of punishing it—to combine with the savage to cheat its own citizens, instead of affording them the protection of its laws and its power in their lawful transactions with the children of the forest.

I said *practically* the Western Cherokees attempted to defraud us by the *per capita* provision in the treaty. I acquit the delegation of any *intentional* fraud. They evinced from first to last a desire that their contract with us should be executed in good faith, and

after the treaty was ratified made the following endorsement upon our contract, viz:—

"The undersigned, delegates of the Western Cherokees or Old 'Settlers, being a party to the treaty recently concluded to put an 'end to Cherokee difficulties, do hereby authorize and request the 'Secretary of War to pay the commissions stipulated for in the 'within contract out of any moneys which may be appropriated to 'pay the debts of the Old Settlers, or out of any moneys which 'may be found due to them under the said treaty, it being our in-'tention that this contract shall be executed in good faith." (Page 30, Doc. above referred to.)

This endorsement was signed by every man of the western delegation who signed the treaty. They came to Washington with written authority from their people to employ and pay counsel, and in that particular, as well as in any arrangement with the United States, *to bind* their constituents *the same as if every one of them were present and consenting.* By virtue of this authority they entered into the contract with us, and by the same authority they entered into the treaty with the United States. Now, the provision in the treaty for the distribution of the indemnity among the Western Cherokees, individually, was a provision *for their benefit*, and *not for the benefit of the United States.* The Western Cherokees had a right to waive this benefit, and under the circumstances, it was their duty as honest men to do so in favor of their *bona fide* creditors. By this endorsement upon our contract they did waive and relinquish it in our favor to the extent of our compensation. The relinquishment rested on precisely the same authority as the treaty, and was equally binding on the Cherokees, collectively and individually. Did the United States hasten to avail themselves of this act of the Western Cherokee delegation for the purpose of securing justice to their citizens? There was now not the slightest obstacle to the payment of our just claim *except the will of our own Government.* It had the money in hand; it had before it not only our contract and power of attorney, showing that we had "an interest in the fund" which it was "bound to recognise," but it had also an express relinquishment by the Western Cherokees, executed after the ratification of the treaty, of all claim to so much of the indemnity as was necessary to discharge their debt to us. Every obstacle and every pretext being thus removed, why did this great and powerful Government, which sends ministers all

over the world, and equips armies and navies to protect its citizens in their lawful transactions with foreign nations and people, comply with the request of these dependant but to us foreign people, and pay us our compensation?

So clear was our right, and so palpable the wrong of withholding our money, that it would probably have been paid to us but for the interposition of Congress. While the act making an appropriation to pay the Western Cherokees was passing through the Senate, a Senator offered the following *proviso*, which was suddenly adopted by both Houses of Congress and became a part of the law, viz:

"*Provided*, That in no case shall any money hereby appropriated 'be paid to any agent of said Indians, or any other person or per-'sons than the Indian or Indians to whom it is due."

Though the professed object of this proviso was to protect the individual Indians against frauds which might be practised upon them when the money came to be distributed, by powers of attorney fraudulently procured in the Indian country, it was construed by the Executive as prohibiting payments to agents of any description. All the facts of our case were before both Houses of Congress, and a Report of the Indian Committee before one House admitting that the Government would be bound to pay the claim itself, if provision were not made to pay it out of the Western Cherokee fund; yet so hastily was the proviso passed, that probably not one man in either House fully appreciated its practical effect. Was there one man who would have voted for it if he had understood it? Was there one man who would have voted to take money which by moral right and the forms of law was ours, and give it to the Indians? But the wrong done us was just as great as if it had been intentional and premeditated. What did the Government practically say to us? It said, we know that you have been the faithful and persevering agents of the Western Cherokees; we know that they are mainly indebted to you for the success of their cause; we know that you have a lien upon their funds, which the courts and the Executive have heretofore considered sacred; we know that you have the consent and request of the Western Cherokees since the treaty was ratified, which would fully justify payment to you; yet, notwithstanding all this, not a dollar shall you have! You have satisfied us that we have grievously injured the Western Cherokees, and ought to pay them a large sum of money, and now we will punish you for convincing us of the wrong, by cutting off your compensation! You shall lose the

fruits of months and years of labor, not for unfaithfulness and failure, but for your fidelity and success!

I do not hesitate to say, that if a private citizen, having the power, were to treat us just as the Government has done in this case, the Courts, would hold him guilty of a gross fraud, to be punished by subjecting him to payment of the money, if not to a more severe penalty.

But it is said the treaty and the proviso were the law of the land, and binding on the Government. This is attempting to justify one's own wrong by pleading his own wrongful act. Who makes treaties and passes laws but the Government? Cannot treaties and laws be made instruments of wrong and oppression? And shall the Government of to-day refuse to redress wrongs done by the Government of yesterday, because they were perpetrated under the color of a treaty or proviso which were themselves a violation of moral principle and vested rights? Every member of Congress is a member of the Government, and when he pleads a wrong done by his predecessors as an excuse for not granting redress, *it is the Government pleading its own wrong as an excuse for perpetuating it.*

In the 9th volume of Peters' Reports of the decisions of the Supreme Court we find a case—Mitchell and others vs. the United States—in which the Court assume a position directly applicable to our claim. It appears that in Florida, while under Spanish dominion, the Indians were permitted to sell their lands to private purchasers, and these sales, confirmed by the Spanish Governor, conferred complete titles. After the annexation of Florida to the United States an attempt was made to invalidate these titles; but they were sustained by the Supreme Court. In their opinion they hold the following language, viz:

"The Indian right to the lands as property was not merely a possession; 'that of alienation was concomitant; both were equally secured, protected, 'and guarantied by Great Britain and Spain, subject only to ratification and 'confirmation by the license, charter, or deed from the Governor representing the King. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by 'the Indians. *It would have been a violation of the faith of the Government to 'both to encourage traders to settle in the province, to put themselves in the power 'of the Indians, to suffer the latter to contract debts, and when willing to pay them 'by the only means in their power—a cession of their lands—withhold an assent to 'the purchase which by their laws or municipal regulations was necessary to vest 'a title.*"—9th Peters' Reports, page 458.

Our case is a much stronger one. In that case there was certainly a legal discretion in the Governor to confirm the sales or not, and the bad faith would have consisted in refusing to do so where the transaction was fair and honest. In our case, the United States encouraged us to put our talents and labor at the disposition of the Indians, by telling us that, if we procured from them a power of attorney as security for our compensation, or "a stipulation," or even "a *bona fide* understanding" that we should receive it "directly from the United States," they had no discretion in the matter, but were "bound to recognise it." We complied with this requisition. The United States suffered the Indians to contract this debt. The Indians had no other means in their power to secure the service and pay for it than to give us an interest in their claim. They were *willing* thus to pay us. The United States knew that they were willing, and that *it was impossible for them to pay us in any other way.* Under all these circumstances, was it not, in the language of the Supreme Court, "*a violation of the faith of the Government*" for the United States to refuse their consent? And was not the bad faith more flagrant from the fact that the Government *swept out of existence the party which had bargained with us, and took all of their property into its own possession?*

(A member of the committee called Mr. Kendall's attention to the fact, that a committee had been raised by the Western Cherokees when the money was sent out for distribution, for the purpose of ascertaining their debts and deciding what should be paid, and inquired what bearing that was supposed to have on the claim now presented?)

Mr. Kendall replied, none whatsoever. There was no authority in the treaty or the law for constituting such a committee, and every dollar paid upon their award was paid in violation of the proviso of Congress. There was as little authority to pay upon the award of that committee as upon the order of the Secretary of the Interior. Only one claim out of many, I believe, was allowed, and that was Colonel Stambaugh's, our co-agent, who procured himself to be made secretary of the committee.

True it is, that my Nephew and Partner, John E. Kendall, went out first to New Orleans and then to the Cherokee country with the view of availing himself of any proper means and occasion to secure our compensation. His instructions were, first, if practicable, to enjoin our money in the hands of the Agent at New Orleans where he was to recieve it, or in Arkansas, and failing in that, to

visit the Cherokee country and be governed by circumstances. Lest, however, this almost hopeless effort should be construed to prejudice our claim on the government, it was preceded by a solemn protest in the following words extracted from a letter to the Secretary of the Interior, viz:

"And in view of the wrong now about to be consummated, unless prevented by your prompt interposition, it will not be deemed amiss in me most respectfully to *repeat the protest heretofore made against being sent to the Cherokee country to collect moneys which by contract are payable at Washington, and again give notice that we, the counsel of the Western Cherokees, look to our Government for the payment of our claims and of all expenses, losses, and damages which have been or may be occasioned to us by its own wrong in this behalf.*"

The Agent refused to obey an injunction if obtained, and after an expenditure of seven or eight hundred dollars, much suffering by sickness and the loss of several months' time, my Nephew returned to Washington wholly unsuccessful. To consider this effort as impairing our claim on the government, is not only to disregard our solemn protest, but to make our loss of money, time and health, brought upon us by the injustice of the government, an excuse for making that injustice perpetual.

So keenly have I felt the conduct of the government towards us in this matter, that I have sometimes declared, that I would continue to petition Congress as long as I live, if redress be not sooner granted, and in my will make it the duty of my children to petition also during their natural lives. I should never have resorted to the occupation of an Agent had I not, for faithfully doing my duty to my government in one of its Departments, been confined to the prison limits of the County of Washington. Nearly all my earnings during that period of oppression, are tied up in this case through the action of that very government, fidelity to whose interests brought that oppression upon me. I know these considerations have nothing to do with the law of the case; but I beg every member of the Committee to make the case his own, and then say, if he can, that a government which has thus treated him, does not owe him prompt and ample reparation.

In conclusion I have to suggest, that the facts being admitted and the only question being one of law, we will be perfectly content to have that question submitted to the Courts with provision that the money shall be paid if the decision shall be in our favor. Authorize us to file a Bill in the Circuit Court in this District, setting forth the facts and presenting the point of law; let the U. S. District Attorney defend on the part of the United States, and give to both parties, a right of appeal to the Supreme Court; and if that Court decides against us, we will trouble Congress no more, but give up our claim forever.